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In The

Supreme Court of the United States

October Term, 1972

No. 72-416

SEWARD MOTOR FREIGHT, INC., et al., PETITIONERS

V.

NEBRASKA STATE RAILWAY COMMISSION and BEE LINE MOTOR FREIGHT, INC., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO ISSUE TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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INDEX

Subject Index

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Constitutional Provisions Involved	4
Regulations Involved	4
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	15
Appendix A	18
Appendix B	21
Appendix C	25

Cases Cited

Abler Transfer, Inc. v. Lyon, 161 Neb. 378, 73 N. W. 2d 667 (1955) — 8

Aetna Freight Lines, Inc., Interpretation of Certificate, 48 M.C.C. 411 (1948) — 9

American Trucking Association, Inc. v. Frisco Transportation Company, 358 U.S. 133 (1958) — 6

Andrews Van Lines v. Nielsen & Peterson, Inc., 180 Neb. 765, 145 N. W. 2d 504 (1966) — 14

Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418 (1944) — 7

Civil Aeronautics Board v. Delta Airlines, 367 U. S. 316 (1961) — 6

Clapps Extension—Alternate Route, 77 M.C.C. 683, 687 (1958) — 9

Hartford Co. v. Harrison, 301 U.S. 459, 463 — 14

Morey v. Doud, 354 U.S. 457 (1957) — 14

Neylon v. Petersen & Petersen Co., Inc., 183 Neb. 813, 164 N. W. 2d 452 (1969) — 14

Shafer Estate—Platte Valley Truck Company, 39 Annual Report of the Nebraska State Railway Commission 270 (1946) — 8

Smith Bros. Revocation of Certificate, 33 M.C.C. 465 (1942) — 7

Transamerican Freight Lines, Inc. v. United States, 258 F. Supp. 910, 920 (1966) — 9

Page

Turner v. Fouche, 396 U.S. 446 (1970) ——— 11
United States et al v. Seatrain Lines, Inc., 329 U.S. 424 (1947) ——— 6
Weber v. Aetna Casualty and Surety Co., 92 S. Ct. 1400 (1972) ——— 10
Williams v. Rhodes, 393 U.S. 23 (1968) ——— 10
Yick Wo v. Hopkins, 118 U.S. 356 (1886) ——— 14, 15

Statutes and Regulations

Neb. Rev. Stat. § 75-315 (R. R. S. 1943) ——— 3, 6, 9
Rule and Regulation No. 19, Nebraska State Railway Commission (1971) ——— 4, 7, 9, 10, 11, 13
Rule and Regulation No. 8, Nebraska State Railway Commission (1967) ——— 12
Rule and Regulation No. 10, Nebraska State Railway Commission (1967) ——— 12

In The

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No. ———

SEWARD MOTOR FREIGHT, INC., et al., PETITIONER

V.

PROPOSED AMENDMENT,
NEBRASKA STATE RAILWAY COMMISSION,
RESPONDENT

APPLICATION OF SEWARD MOTOR FREIGHT, INC.,
PETITIONER

V.

BEE LINE MOTOR FREIGHT, INC.,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO ISSUE TO THE SUPREME COURT OF THE STATE OF NEBRASKA

Seward Motor Freight, Inc., and others specified herein on the signature page, pray that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Nebraska, entered in cases numbered 38067 and 38055 on March 31, 1972. There is currently pending before that Court, a Motion to Recall the Mandate issued by that Court on June 12, 1972,

which, if granted, would stay that Mandate pending a resolution of this Petition.

OPINIONS BELOW

The decision of the Nebraska State Railway Commission, entered the 15th day of March, 1972 is not officially reported but is set out in Appendix A to this petition at page 18. The decision of the Supreme Court of the State of Nebraska, filed March 31, 1972, is officially reported at 188 Neb. 223, N.W.2d (1972).

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment and decision of the Supreme Court of the State of Nebraska entered on March 31, 1972 is invoked under the provisions of 28 U.S.C. § 1257(3) (1970).

QUESTIONS PRESENTED

1. Whether the state court erred in failing to recognize as a property right the inherent right to combine separate segments of unrestricted operating authority where the state regulatory agency tacitly condoned the practice and the industry developed operations and business relied upon by carriers and the shipping public?
2. Whether the federal "due process" clause was violated by restricting the service capable of being performed under existing operating authorities where the state failed to comply with the procedures required by statute to be employed in restricting operating authorities?
3. Whether the federal "equal protection" clause was violated by the state commission prohibition against combining authorities to one class of carriers while

expressly authorizing another class of carriers to combine authorities absent any expressed or implied rationale by which such discrimination could be justified?

4. Whether the federal "due process" clause was violated through arbitrary and capricious administration of the rule as illustrated by the specific denial to an individual applicant of permission to combine authorities where such permission was approved for similarly situated carriers upon a lesser quantum and quality of evidence.

STATUTES INVOLVED

The relevant provision of Neb. Rev. Stat. § 75-315 (R.R.S. 1943) involved in the instant case reads as follows:

> Permits and certificates shall be effective from the dates specified therein, and shall remain in effect until terminated as provided in sections 75-315 to 75-317. Any such permit or certificate may, upon application of the holder thereof, in the discretion of the commission, be revoked or may, upon complaint or *on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-101 to 75-801, or with any lawful order, rule, or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate*; Provided, the commission may suspend or revoke any permit or certificate of any motor carrier who shall refuse, or subject to any undue or unreasonable delay, any pickup, delivery, or connecting line service, to any shipper, consignee, carrier, or any other person or persons, at any point authorized to be served by such carrier, notwithstanding any hot cargo agreement, or other agreement, had between such motor carrier and a labor organization, or any other or-

ganization, person, or persons. For the first such offense, the commission shall, after notice and hearing, suspend the proceedings for a period of six months, and if no further offenses are committed by the defendant during such suspension, the complaint shall be dismissed by the commission. For a second offense committed during such suspension of the proceedings, after notice and hearing, the permit or certificate shall be suspended for a period not to exceed ten days, and for a third offense committed during such suspension of proceedings, after notice and hearing, the permit or certificate shall be revoked. [Emphasis added].

CONSTITUTIONAL PROVISIONS INVOLVED

The articles in addition to, and amendment of, the Constitution of the United States of America involved in the instant case read, in pertinent part, as follows:

ARTICLE XIV

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REGULATIONS INVOLVED

The provision of Rule and Regulation No. 19 of the Nebraska State Railway Commission involved in the instant case reads as follows:

Motor common carriers shall not tack their irregular route authorities, nor shall they tack their irregular and regular route authorities. Motor common carriers may tack their regular route authorities.

STATEMENT OF THE CASE

On March 15, 1971, the Nebraska State Railway Commission ordered that Sections 1.6 and 1.7, Article

2, Chapter 3, of the Rules and Regulations of the Nebraska State Railway Commission be rescinded. The Commission further ordered Rule and Regulation Order No. 19 be adopted as follows:

> Motor Common Carriers shall not tack their irregular route authorities nor shall they tack their irregular and regular route authorities. Motor Common Carriers may tack their regular route authorities.

The Commission ordered further that Rule and Regulation Order No. 19 should become effective on April 1, 1971. It is from that order that the petitioners took an appeal to the Supreme Court of the State of Nebraska.

By a petition filed April 1, 1970, Seward Motor Freight, Inc. sought authorization by the Nebraska State Railway Commission to provide service as a motor common carrier by tacking or joining its regular route and irregular route authorities which it held under Application No. M-8750 and supplements thereto. This application was initially opposed, but all protests were subsequently withdrawn. After hearing in which six witnesses testified, the Commission entered an order on December 14, 1970, denying the petition. On February 8, 1971, oral argument on a motion for rehearing and/or reconsideration was held. On February 24, 1971, the Commission ordered that the motion for rehearing and/or reconsideration be overruled and that the order of December 14, 1970, be sustained. From that order the petitioner, Seward Motor Freight, Inc. took an appeal to the Supreme Court of the State of Nebraska, where it was consolidated with the appeal from the promulgation of Commission Rule and Regulation No. 19.

In an opinion handed down March 31, 1972, the Supreme Court of the State of Nebraska affirmed the

Commission in both cases. By Motion filed April 14, 1972, Petitioners requested that the Nebraska Supreme Court vacate and set aside its opinion and decision filed on March 31, 1972, and to grant the Petitioners herein a rehearing and reconsideration of the consolidated causes on appeal. It is from the denial of this Motion that the Petitioners submit this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment to the Constitution provides that no state shall "deprive any person of life, liberty or property, without due process of law." This Court has consistently recognized that certificated authority of the type involved in this proceeding, falls within the protection of the Fourteenth Amendment. *American Trucking Association, Inc. v. Frisco Transportation Company*, 358 U.S. 133 (1958). See, also, *United States et al v. Seatrain Lines, Inc.*, 329 U.S. 424 (1947), and *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316 (1961). It is evident, therefore, that any deprivation resulting from a modification or revocation of such certificated authority must be in compliance with due process of law.

Neb. Rev. Stat. § 75-315 (R.R.S. 1943), sets forth the procedural requirements for suspension, modification or revocation of such certificates. It provides that the Commission may revoke, suspend or modify any such permit or certificate only after notice *and hearing*. The Commission has, in this case, promulgated a rule and regulation, the effect of which is to restrict existing operating certificates against tacking.

The Nebraska Supreme Court has had opportunity to consider the Commission's power of revocation on numerous occasions, and has consistently construed this

power to be limited by and to the statutory provisions relevant to revocation and modifications of certificates and permits. See, *In Re Application of Hergott*, 145 Neb. 100, 15 N. W. 2d 418 (1944). This procedural limitation on revocation and modification of certificates is completely consistent with the policies and procedures followed by the Interstate Commerce Commission. See, *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465 (1942).

The Nebraska Supreme Court resolved this question by finding, contrary to the weight of the evidence and contrary to the recognized practices of the transportation industry, that, because there had been no clearly defined policy with regard to tacking, there was no right to tack unless specifically made a part of the operating certificate granted by that Commission. The Commission contends that it is not modifying or revoking any certificate by the implementation of Rule and Regulation No. 19 because it has never recognized tacking as a part of operating certificates granted by the Commission.

The language used by the Commission, as well as the Nebraska Supreme Court, is clearly contrary to the Commission's contentions. At page one of the Commission's Opinion and Findings attached hereto as Exhibit "A", states:

> It is the opinion of the Nebraska State Railway Commission that, in order to best serve the public interest and to protect existing certificates of public convenience and necessity issued by this Commission, the "tacking" or "joining" of regular to irregular route authorities, as well as irregular to irregular route authorities, *should no longer be allowed*. Accordingly, the Commission is of the opinion that the proposed Rule and Regulation No. 19 as finally amended by the Commission staff

> should be adopted. *In adopting this position, the Commission is fully aware that the service rendered by past "tacking" operations has been the primary, if not the only, trucking service provided to some communities in this state.* [Emphasis added]

In addition to this language which clearly indicates that the Commission has "allowed" tacking in the past, the Commission has similarly recognized that approval of a merger of companies holding separate authorities will *automatically* entitle the holder to tack those authorities together. The Commission denied such a merger proposal for the express reason of avoiding the automatic tacking capability in *Shafer Estate—Platte Valley Truck Company*, 39 Annual Report of the Nebraska State Railway Commission 270 (1946). In that case, the transferor held three regular-route authority segments and one irregular-route segment. The transferee held six regular-route segments. The Commission noted:

> The granting of the instant application would create a network of routes with through service from all points on the six routes over which Resler (Platte Valley) operates, as set forth above, to and from Omaha through the common points of interchange at Holdrege, McCook, and Culbertson on U.S. No. 6 (39 Ann. Rep. at 273-4).

In *Abler Transfer, Inc. v. Lyon*, 161 Neb. 378, 73 N. W. 2d 667 (1955), the Commission, again, manifested its recognition of tacking as a part of certificated authority. In that case, the Supreme Court of Nebraska approved the Commission's imposition of a tacking restriction on a certificate in a transfer proceeding. Clearly, if the Commission felt it necessary to specifically prohibit tacking in one case, its failure to do so in others shows that the tacking of two unrestricted grants of authority was permitted. Whether this conscious

approval of tacking is a matter of policy or a matter of right is immaterial. The tacking which has been condoned by the Commission for the last 30 years arose from none other than the operating rights issued by the Commission.

Of course, this policy which allows tacking, as a part of certificated operating authority, is in complete conformity with the practices of the Interstate Commerce Commission where tacking is a matter of right unless the certificates or permits are specifically restricted thereto. The I.C.C. has long held that unrestricted, separate grants of authority may be tacked, whether involving regular routes, irregular routes, or a combination of the two. In *Aetna Freight Lines, Inc., Interpretation of Certificate*, 48 M.C.C. 411 (1948) the Commission said:

> The right of the motor carrier to tack separate grants of unrestricted authorities involves regular routes, irregular routes, or a combination of both.

See, also, *Clapps Extension—Alternate Route*, 77 M.C.C. 683, 687 (1958); *Transamerican Freight Lines, Inc. v. United States*, 258 F. Supp. 910, 920 (1966).

It is clear that not only has tacking been recognized and tacitly condoned by the Nebraska Railway Commission, but that tacking arose out of operating authority issued by the Commission and has, until adoption of Rule and Regulation No. 19, been part and parcel of such certificated authority. The Commission has modified and revoked what has always been considered as a right arising from certificated operating authority in violation of Neb. Rev. Stat. § 75-315 (1943), thereby denying Petitioners due process of law. It is clearly evident that the Nebraska Supreme Court erred in failing to recognize the inherent right to combine separate segments of unrestricted operating authority where the

State Railway Commission, as noted hereinbefore, has tacitly condoned, where the transportation industry has developed operations and business in reliance upon this policy, and where the Commission admits that a large segment of the general shipping public will be left without certificated service by the Commission's actions.

It is also clear that the equal protection clause of the 14th Amendment was violated by the promulgation of Rule and Regulation No. 19 by the Nebraska State Railway Commission. That rule, as set forth hereinbefore, prohibits combining authorities by one class of carriers while expressly authorizing another class of carriers to combine authorities.

It has been shown that certificated operating authority is a property right which, as a fundamental right, is protected by the equal protection clause of the Fourteenth Amendment. The effect of Rule and Regulation No. 19 not only restricts existing certificated operating authorities, but establishes a classification under which some operating authority may not be tacked while other operating authority may be tacked. The Rule and Regulation sets up a prohibitive discriminatory classification which restricts tacking where it was previously allowed. In determining whether or not state law, or here an administrative rule carrying the weight of state law, violates the equal protection clause, the Supreme Court must consider facts and circumstances of the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification. *Williams v. Rhodes*, 393 U.S. 23 (1968). In *Weber v. Aetna Casualty and Surety Co.*, 92 S. Ct. 1400 (1972), the Court stated that in all cases involving equal protection the essential inquiry is a dual one: "What legitimate state in-

terest does the classification promote? What fundamental personal rights might the classification endanger?"

The burden of proving a compelling state interest is upon the state. It must affirmatively show that the restrictive classification bears a logical relationship to legitimate state purposes, that the public benefits outweigh the derogation of private fundamental rights, and that no other alternative means less subversive of these fundamental rights are available. *Turner v. Fouche*, 396 U.S. 446 (1970). Not only has the State failed to show any compelling state interest which justifies the discriminatory classification resulting from Rule and Regulation No. 19, but it has clearly admitted, through the Commission's own findings and opinion, that the public benefit will be substantially impaired through implementation of this Rule and Regulation. As noted hereinbefore, the Commission recognized that past tacking operations have been the only source of service to some communities in Nebraska. It is clear the public benefit to be served is not served at all by the derogation of the rights involved.

In addition, the Commission has available to it the means of promoting the interest sought to be served by this Regulation, by restricting certificates granted to the specific routes authorized, and the Commission has done so many times in the past. (See, for example, T198, 212, 219 and 228). Because the Commission has available to it alternative means of promoting this interest, the Commission should not be allowed to use this discriminatory blanket means to accomplish this purpose. The Commission has recognized that tacking of operating authorities should be determined on a carrier-by-carrier basis after considering evidence of such operations and their effect or lack thereof on the ap-

plicant, the public need for service involving tacking operations and the effect, if any, on protestants of such operations or lack thereof. The blanket means by which Rule and Regulation No. 19 operates disregards any actual public convenience and necessity for such transportation services existing in any particular instance. Because this restriction upon the rights of the petitioners affects a fundamental property right; because the Commission's own statements point out the disservice to many communities which the Rule perpetrates; and because there are alternative means available to the Commission resulting in a less subversive discrimination; the Commission has not produced even a scintilla of justification for the rule or its discriminatory classification which would outweigh the burdens and injustices it produces.

The action of the Nebraska State Railway Commission in its denial of the application of Seward Motor Freight, Inc. for authority to tack its irregular route authority with its regular route authority, in the face of no opposition and with a proven public convenience and necessity for such service, is arbitrary, capricious, unreasonable and is a denial of due process and equal protection under the laws.

On October 9, 1967, the Commission issued Rule and Regulation Order No. 8, and on December 7, 1967, the Commission issued Rule and Regulation No. 10, both effective on January 1, 1968. The effect of these two Rules was to prohibit tacking of irregular with regular route authority, and irregular with irregular route authority. But the Commission assured carriers that if they filed petitions seeking authority to continue operations involving tacking which they had been conducting, those petitions would be treated on a "grandfather" basis. Attached hereto as Appendix B and Appendix C are orders concerning two Petitions for Authority to

Tack filed by Winter Bros., Inc. and Ellis Transfer both of which were treated as applications, both of which elicited no shipper support, and both of which were unprotested.

The Winter Bros. and Ellis Transfer cases were heard and proceedings conducted, ostensibly the first of some twenty-six carriers who filed such petitions seeking approval of their operations involving tacking. Both petitions were granted February 9, 1970. Up to this point, it appeared that the Commission was abiding by its earlier commitments to the carriers. For some reason which has never been explained, the Commission changed its policy and position and decided it would attempt to prevent operations involving tacking of segments of authority.

In October of 1970, the Petitioner's request was heard. Petitioner's hearing produced a much stronger record and the evidence in the Ellis Transfer and Winter Bros. proceedings was considerably less substantial than Petitioner's evidence. Not only were the chief operating officers of Seward Motor Freight and the predecessor and holder of the authority involved called as witnesses, but also several shipper witnesses who demonstrated their need for the continued service of Seward Motor Freight which could be provided only by tacking their existing authority together. On December 10, 1970, the Railway Commission instituted the Rule and Regulation No. 19 and within four days denied the Petitioner's application.

There is no ascertainable reason as to the different attitude that has been exhibited by the Commission toward Seward Motor Freight as contrasted to that in the case of previous applicants. The applicant has met the statutory requirements by a showing in the record of a public need for its services. Public necessity

and convenience have been shown by continued operations under its current operating authority under the "color of right" which is recognized as a permissible basis of proving public convenience and necessity by the Nebraska State Supreme Court. *Andrews Van Lines v. Nielsen & Peterson, Inc.*, 180 Neb. 765, 145 N. W. 2d 504 (1966) at page 67 and in *Neylon v. Petersen & Petersen Co., Inc.*, 183 Neb. 813, 164 N. W. 2d 452 (1969). The record clearly establishes the public convenience and necessity for such services. In fact, not only some shippers, but in some instances, entire towns require the services of the applicant. Since the application was unopposed there could be no adverse effects upon other carriers and there were no challenges to the fitness and ability of the carrier. There is likewise no ascertainable reason for treating the class of carriers holding irregular-route authority differently from those possessing regular-route authorities. The Supreme Court held such unexplained arbitrary differences in treatment to be violative of the equal protection clause of the United States Constitution in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The applicability of that clause to the present fact situation is best illustrated by the decision in *Morey v. Doud*, 354 U.S. 457 (1957):

> Of course, distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved. This is so even where the discrimination is by name. But distinctions cannot be so justified if the "discrimination has no reasonable relation to these differences." *Hartford Co. v. Harrison*, 301 U.S. 459, 463.

In the *Hartford* case, the Supreme Court held that a state statute which permitted mutual insurance companies to act through salaried resident employees, but

which excluded stock insurance companies from the same privilege, violated the equal protection clause. Similarly, the State of Nebraska, through its Railway Commission, is permitting regular-route carriers to provide through service by tacking authorities while excluding irregular-route carriers and carriers holding both types of authorities from the same privilege. As the Supreme Court said in *Yick Wo, supra*:

> . . . No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. . . .

That language has equal applicability herein.

But, beyond the disparity in treatment accorded this definable class of carriers, there is the principal involved that a property right has been impaired without due process of law. In addition to contravening Nebraska statutes, this arbitrary action violates still another section of the Fourteenth Amendment of the United States Constitution: the Due Process Clause.

The present record is replete with evidence of the investments made to provide service through the combination of separate segments of operating authority. The refusal of the Commission to approve the Seward Motor Freight petition demonstrates the unavailability of any remedy to these carriers. The ultimate impact of the rule will be to adversely affect the public, as well as the carriers, with no reasonable justification.

CONCLUSION

It is apparent that tacking has always been permitted, that the Commission has allowed its free and unrestrained practice and that entire businesses are based upon the ability to continue to do so. There has

been no showing of desirable effects to be realized by the Rule, and, conversely, it is clear that the public and the appellant carriers will be adversely affected.

The Commission cannot be permitted unbridled discretion to change the operating prerequisites of outstanding certificates. This is why the Legislature requires a violation, notice and a hearing as conditions to any change or modification. To consider that the right to tack never existed is to simply ignore the record and the facts. The concern then, as now, should be that no regulatory agency should be given such power that it can, with no evidence, follow a whim that puts certain classes of companies in jeopardy of losing their businesses.

The fact that this danger exists is illustrated by the specific example which is now before this Court—Seward Motor Freight. This illustrates that, if the Rule had any basis in reason, its method of application overrides any possible or theoretical rationalizations.

The Commission then goes on with passage of this unjustified Rule by exempting one class of carriers from its strictures, but giving no reason or justification for same. If there is any question that a property right is involved, the testimony of the stockholder of Seward Motor, which is summarized in appellants' initial brief to the Nebraska Court would allay any doubts. But the Railway Commission is permitted to take away that right with no regard for governing statutes or required procedures.

It seems clear that the Commission's blanket restrictions on existing operating authority are a violation of due process and that the Rule and Regulation itself is violative of equal protection under the law in its unjustified discrimination between classes of carriers.

Equally as clearly, the Commission's denial of Petitioner's application, in the face of the evidence in that proceeding and prior actions of the Commission is the most abusive form of exercise of discretion as well as depriving the Petitioner of Equal Protection under the law.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SEWARD MOTOR FREIGHT, INC.
BOOTH TRANSFER, INC.
IDEAL TRUCK LINE, INC.
LOGAN VALLEY TRANSFER, INC.
STROMSBURG MOTOR FREIGHT, INC.
WADE BUS LINE, INC.
NEBRASKA CITY TRANSFER
YOUNG & HAY TRANSPORTATION CO.
ABLER TRANSFER, INC.
CENTRAL TRANSPORTATION COMPANY, INC.
CRETE-WILBER FREIGHT, INC.
DIAMOND FREIGHTWAYS, INC.
LOUISVILLE TRANSFER
LYON TRANSFER
ROSS TRANSFER, INC.
SCHWEDHELM FREIGHT
STEFFY'S TRANSFER
ELLIS TRANSFER
WINTER BROS., INC.

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APPENDIX A

BEFORE THE NEBRASKA STATE RAILWAY COMMISSION

In the Matter of Proposed Amendment to Chapter III of the Commission's Rules and Regulations, Concerning the Tacking or Joining of Motor Carrier Authorities

RULE AND REGULATION ORDER NO. 19
Entered March 15, 1971

BY THE COMMISSION:

OPINION AND FINDINGS

Public hearings were held on January 26, 1971, February 19, 1971, and March 5, 1971, after notice of the hearing, as well as the scope of said hearing, was published in the Daily Record, Omaha, Nebraska, on December 10, 1970.

The purpose of the hearings was to consider the adoption of an amendment to Chapter III of the Commission's Rules and Regulations concerning the tacking or joining of motor common carrier authorities in the State of Nebraska. As originally published, it was proposed that motor common carriers should not tack their authorities, whether regular or irregular, or both, after April 1, 1971. During the hearings in this matter, the proposal was amended as follows:

> Motor common carriers shall not tack their irregular route authorities nor shall they tack their irregular and regular route authorities. Motor common carriers may tack their regular route authorities.

It is the opinion of the Nebraska State Railway Commission that, in order to best serve the public interest and to protect existing certificates of public convenience and necessity issued by this Commission, the "tacking" or "joining" of regular to irregular route au-

thorities, as well as irregular to irregular route authorities, should no longer be allowed. Accordingly, the Commission is of the opinion that the proposed Rule and Regulation No. 19 as finally amended by the Commission staff should be adopted.

In adopting this position, the Commission is fully aware that the service rendered by past "tacking" operations has been the primary, if not the only, trucking service provided to some communities in this State. It is not the intent of this Commission to deprive any community of needed trucking service. However, this Commission is of the opinion that it cannot effectively and efficiently regulate the motor common carrier industry or best serve the public interest if it continues to allow such "tacking" of authorities. "Tacking" or "joining" of irregular route to irregular route authorities and regular route to irregular route authorities tends to eliminate and destroy the restrictions and limitations placed upon such certificates of public convenience and necessity by the Commission's Orders and Rules and Regulations.

Therefore, where there is a need for irregular service into an area or community outside of the central radius of an irregular route radial authority, an application must be made to the Commission to serve such point or points as an additional base point to the carrier's irregular route authority. Likewise, if there is a need for service to an area or community on a regular basis, such areas or communities can be served by making application to the Commission to serve these points as off-route points to the carrier's existing regular route. Such applications will be granted by this Commission upon a showing of the statutory requirements of the carrier's fitness and public convenience and necessity.

For the foregoing reasons, the Commission is of the opinion and finds:

1. That Sections 1.6 and 1.7, Article 2, Chapter III, of the Rules and Regulations of the Nebraska State Railway Commission, be rescinded.

2. That the proposed Rule and Regulation Order No. 19 be adopted as finally amended.

ORDER

IT IS, THEREFORE, ORDERED by the Nebraska State Railway Commission that Sections 1.6 and 1.7, Article 2, Chapter III, of the Rules and Regulations of the Nebraska State Railway Commission, be rescinded.

IT IS FURTHER ORDERED by the Nebraska State Railway Commission that Rule and Regulation Order No. 19 be adopted as follows:

> Motor common carriers shall not tack their irregular route authorities nor shall they tack their irregular and regular route authorities. Motor common carriers may tack their regular route authorities.

IT IS FURTHER ORDERED that Rule and Regulations Order No. 19 shall become effective on April 1, 1971.

MADE AND ENTERED at Lincoln, Nebraska, this 15th day of March, 1971.

NEBRASKA STATE RAILWAY COMMISSION
/s/ Eric Rasmussen
Chairman
ATTEST:
/s/ M. B. McManaman
Secretary

COMMISSIONERS CONCURRING:
/s/ Robert T. Marland
/s/ Duane D. Gay
/s/ James F. Munnelly

APPENDIX B

BEFORE THE NEBRASKA STATE RAILWAY COMMISSION

In the Matter of the Application of
WINTER BROS., INC., Lincoln, Nebraska

APPLICATION No. M-11398
SUPPLEMENT No. 1
GRANTED

Entered February 9, 1970

Appearances: Charles J. Kimball, Attorney
605 South 14th Street
Lincoln, Nebraska
Appearing for Applicant

BY THE COMMISSION:

OPINION AND FINDINGS

By application filed December 20, 1967, Winter Bros., Inc., Lincoln, Nebraska, hereinafter referred to as Applicant, seeks authority to tack its irregular and regular route authorities issued in M-11398. The certificate issued in M-11398 authorizes the following operations:

SERVICE AUTHORIZED: Commodities generally, except those requiring special equipment.

ROUTE OR TERRITORY AUTHORIZED: Regular Route Operations: Between Omaha and Lincoln, via US-6, serving no intermediate points.

Irregular Route Operations: Between all points and places within a 30-mile radius of Seward, and between points and places within said radial area

on the one hand, and, on the other hand, all points and places within a 250 mile radius of Seward.

Notice of the above-captioned application was published in the Daily Record, Omaha, Nebraska, on January 1, 1968, pursuant to the rules and regulations of the Nebraska State Railway Commission.

A hearing was held in the Commission Hearing Room, Lincoln, Nebraska, on November 12, 1969, pursuant to notice given to all interested parties. No parties appeared at this hearing in opposition to the granting of this application.

Applications to tack irregular and regular route authorities are governed by Chapter 3, Article 2, Section 1.6 of the Rules and Regulations of the Nebraska State Railway Commission. That Section states: "Motor common carriers shall not tack their irregular route authorities. Unless specifically authorized by the Commission after notice and hearing, motor common carriers shall not tack their irregular route and regular route authorities nor tack their regular route authorities. Tacking of such authority shall be approved only upon proof by an Applicant and a finding by the Commission that the proposed tacking is or will be required by the present or future public convenience and necessity. As used in this rule, tacking shall include the terms 'joining' and 'combining'."

Applicant's only witness was Mr. Waldo W. Winter, president of Winter Bros., Inc.

Mr. Winter testified that his company has performed operations similar to that requested in this application for the past 12 to 14 years. He stated that he had performed such operations because of numerous requests from shippers. As a result the Applicant has purchased

equipment and geared its operation to serving the type of business that would be performed by tacking its regular and irregular route operations. The evidence indicates that a large share of the operations conducted by the Applicant is devoted to this type of operation. Mr. Winter stated that he could provide a better and faster service to the shipping public by tacking his regular and irregular route authorities.

The evidence is sufficient to sustain a finding by the Commission that the refusal to allow this applicant to tack his regular and irregular route authorities would have an adverse effect on the Applicant, the shippers, and the public in general. It is therefore clear that the tacking proposed by this Applicant is or will be required by the present or future public convenience and necessity.

Upon due consideration of the evidence and being fully advised on the premises, the Commission is of the opinion and finds:

1. That the tacking of this Applicant's regular and irregular route authorities is or will be required by the present or future public convenience and necessity.
2. That the application should be granted.

ORDER

IT IS, THEREFORE, ordered by the Nebraska State Railway Commission that the application of Winter Bros., Inc., Lincoln, Nebraska, in Application No. M-11398, Supplement No. 1, be, and it is hereby granted; and that the Applicant is hereby authorized to tack its irregular and regular route authorities issued in Certificate M-11398.

MADE AND ENTERED at Lincoln, Nebraska, this 9th day of February, 1970.

NEBRASKA STATE RAILWAY COMMISSION
/s/ John W. Swanson
Chairman

ATTEST:
/s/ M. B. McManaman
Secretary

COMMISSIONERS CONCURRING:
/s/ James F. Munnelly
/s/ Joseph J. Brown
/s/ John W. Swanson
/s/ Eric Rasmussen

APPENDIX C

BEFORE THE NEBRASKA STATE RAILWAY COMMISSION

In the Matter of the Application of
Harvey Ellis, dba ELLIS TRANSFER,
West Point, Nebraska

APPLICATION NO. M-893
SUPPLEMENT NO. 3
GRANTED

Entered February 9, 1970

Appearances: Charles J. Kimball, Attorney
605 South 14 Street
Lincoln, Nebraska
Appearing for Applicant

BY THE COMMISSION:

OPINION AND FINDINGS

By application filed February 23, 1968, Harvey Ellis, dba Ellis Transfer, West Point, Nebraska, hereinafter referred to as Applicant, seeks authority to tack his irregular and regular route authorities issued in Application No. M-893, Supplement No. 2. The Certificate issued in M-893, Supplement No. 2, authorizes the following operations:

SERVICE AUTHORIZED: Commodities generally (including livestock and commodities requiring refrigeration), except commodities in bulk in tank or hopper type vehicles.

ROUTE OR TERRITORY AUTHORIZED: Regular Route Operations: 1. Between West Point and Fremont, Nebraska, via US-275; serving all intermediate points and the off-route points of Wisner and Beemer, Nebraska. 2. Between Fremont and Omaha Nebraska, via US-275; serving all inter-

mediate points. Alternate Route: (1) from junction of US-275 with US-30A, via US-30A and (2) from junction of US-275 with US-30A, via US-30A to junction with IS-280, then IS-280 to junction with IS-80, then IS-80 to Omaha. 3. Alternate Route for operating convenience only: Between West Point and Omaha, Nebraska, via Nebr-32 to junction with US-73, then US-73 to junction with Nebr-133, then Nebr-133 to junction with Nebr-36, then Nebr-35 to Omaha; serving no intermediate points.

IRREGULAR ROUTE OPERATIONS: Between points within a 20-mile radius of West Point, Nebraska, and between points in said radial area on the one hand and, on the other hand, all points in Nebraska, over irregular routes.

Notice of the above-captioned application was published in the Daily Record, Omaha, Nebraska, on February 23, 1969, pursuant to the Rules and Regulations of the Nebraska State Railway Commission.

Hearing was held in the Commission Hearing Room, Lincoln, Nebraska, on November 12, 1969, pursuant to notice given to all interested parties. No persons appeared at the hearing in opposition to the granting of this application.

Applications to tack irregular and regular route authorities are governed by Chapter 3, Article 2, Section 1.6 of the Rules and Regulations of the Nebraska State Railway Commission. That Section states: "Motor common carriers shall not tack their irregular route authorities. Unless specifically authorized by the Commission after notice and hearing, motor common carriers shall not tack their irregular route and regular route authorities nor tack their regular route authorities. Tacking of such authority shall be approved only upon proof by an applicant and a finding by the Com-

mission that the proposed tacking is or will be required by the present or future public convenience and necessity. As used in this rule, 'tacking' shall include the terms 'joining' and 'combining'."

The Applicant appeared and testified that he has performed tacking operations similar to that requested in this application for the past several years. The Applicant testified that he had performed such operations as a result of requests from shippers. Applicant stated that he has geared his operations in terms of operating equipment and other equipment to the performance of service involving tacking of his irregular and regular route authorities. He further stated that at present 30 to 35 per cent of his total operations involves tacking of his authorities. Applicant testified that he is able to provide a better service to the shippers by tacking his authorities.

The evidence is sufficient to sustain a finding by the Commission that the refusal to allow this Applicant to tack his regular and irregular route authorities would have an adverse effect on the Applicant, the shippers, and the general public. It is therefore clear that the tacking proposed by this Applicant is or will be required by the present or future public convenience and necessity.

Upon due consideration of the evidence and being fully advised in the premises, the Commission is of the opinion and finds:

1. That the tacking of this Applicant's regular and irregular route authorities is or will be required by the present or future public convenience and necessity.
2. That the application should be granted.

ORDER

IT IS, THEREFORE, ORDERED by the Nebraska State Railway Commission that the application of Harvey Ellis, dba Ellis Transfer, West Point, Nebraska, in Application No. M-893, Supplement No. 3, be, and it is hereby, granted; and that the Applicant is hereby authorized to tack its irregular and regular route authorities issued in Certificate M-893, Supplement No. 2.

MADE AND ENTERED at Lincoln, Nebraska, this 9th day of February, 1970.

NEBRASKA STATE RAILWAY COMMISSION
/s/ John W. Swanson
Chairman

ATTEST:
/s/ M. B. McManaman
Secretary

COMMISSIONERS CONCURRING:
/s/ James F. Munnelly
/s/ Joseph J. Brown
/s/ John W. Swanson
/s/ Eric Rasmussen

FILE COPY

72-416

Supreme Court, U. S.
FILED
SEP 18 1972
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

October Term, 1972

No. 72-416

SEWARD MOTOR FREIGHT, INC., et al., PETITIONERS

V.

NEBRASKA STATE RAILWAY COMMISSION and BEE LINE MOTOR FREIGHT, INC., RESPONDENTS

APPENDIX D TO PETITION FOR A WRIT OF CERTIORARI TO ISSUE TO THE SUPREME COURT OF THE STATE OF NEBRASKA

NELSON, HARDING, MARCHETTI, LEONARD & TATE and
EARL H. SCUDDER, JR.
300 N.S.E.A. Building
P. O. Box 82028
Lincoln, Nebraska 68501

JOE CHRISTENSEN, INC., 1540 Adams, Lincoln, Nebraska

In The

Supreme Court of the United States

October Term, 1972

No. ———

SEWARD MOTOR FREIGHT, INC., et al., PETITIONERS

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NEBRASKA STATE RAILWAY COMMISSION and BEE LINE MOTOR FREIGHT, INC., RESPONDENTS

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APPENDIX D

IN THE

SUPREME COURT OF THE STATE OF NEBRASKA

38067 In Re Proposed Amendment, Nebraska State Railway Commission v. Seward Motor Freight, Inc.

38955 In Re Application, Seward Motor Freight, Inc. v. Bee Line Motor Freight, Inc.

Filed March 31, 1972

1. The failure of the Nebraska State Railway Commission previous to January 1, 1968, to enunciate a

rule and regulation on tacking cannot be construed to imply that the right to tack was inherent in certificates heretofore issued unless specifically restricted.

2. The right to prohibit the tacking of regular to irregular route authorities, or irregular to irregular route authorities, is a policy determination within the inherent authority of the Nebraska State Railway Commission.

3. Common carriers cannot acquire prescriptive rights by virtue of unauthorized use of routes.

4. Tacking is an extension of the authorized service and must be and is under the regulation of the Nebraska State Railway Commission rather than being left to the unbridled discretion of carriers subject to regulation by the Commission.

5. On appeal from an order of the Nebraska State Railway Commission administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order is reasonable and not arbitrarily made.

Heard before White, C. J., Spencer, Boslaugh, Smith, McCown, Newton, and Clinton, JJ.

SPENCER, J.

Appeals Nos. 38067 and 38055 were consolidated in this court for the purposes of briefing and argument, and, because they are closely related, we shall consider them together.

Case No. 38067 involves the adoption of an amendment to Chapter III of the Rules and Regulations of the Nebraska State Railway Commission concerning the tacking or joining of motor common carrier authori-

ties in the State of Nebraska. We affirm the right of the Commission to adopt the amendment.

Case No. 38055 involves the application of Seward Motor Freight, Inc., hereinafter referred to as Seward, to tack its regular and irregular route authorities. Those authorities are as follows: "Commodities generally, except those requiring special equipment. Regular Route: Between Omaha and Grand Island, via US-6 to Lincoln; thence via US-34 to junction with US-281; thence via US-281 to Grand Island, serving all intermediate points and the off-route points to Bee, Tamora and Phillips.

"RESTRICTION: No local service to be performed between Omaha and Lincoln or points intermediate thereto.

"Irregular Route: Between points within a 10-mile radius of Seward, and between points within said radial area on the one hand, and, on the other hand, points in Nebraska." The application to tack the authorities was denied. We affirm.

On March 15, 1971, the Nebraska State Railway Commission entered the following order: "Motor common carriers shall not tack their irregular route authorities nor shall they tack their irregular and regular route authorities. Motor common carriers may tack their regular route authorities." This order, which will be hereinafter referred to as Rule 19, was entered pursuant to notice published December 10, 1970, and hearings held on January 26, 1971, February 19, 1971, and March 5, 1971. The original published notice was broader than the order entered in that it would have prevented the tacking of regular authorities. The order as entered prohibits tacking of irregular route authorities and the tacking of irregular and regular route

authorities, but specifically authorizes the tacking of regular route authorities.

The protestants and objectors are the following appellants herein: Seward Motor Freight, Inc.; Booth Transfer, Inc.; Ideal Truck Lines, Inc.; Logan Valley Transfer, Inc.; Stromsburg Motor Freight, Inc.; Nebraska City Transfer; Arrow Freight Lines, Inc.; and Young and Hay Transportation, Inc.

Appellants set out nine specific assignments of error. We notice the following: "1. The order of the Commission in the Rule and Regulation No. 19 proceeding was entered without jurisdiction or power to enter it.

"2. Said order deprives appellants of rights and property without due process of law in violation of the due process clauses of the Nebraska and U. S. Constitutions.

"3. Said order is arbitrary and unreasonable. • • •

"5. The Commission erred in finding that said order will best serve the public interest, 'protect existing certificates,' and that tacking of regular route and irregular route motor common carrier authorities or irregular route authorities should not be allowed.

"6. The Commission erred in concluding that it could not effectively and efficiently regulate the motor common carrier industry or best serve the public interest if such tacking is allowed and that tacking 'tends to eliminate and destroy the restrictions and limitations placed in certificates.' "

The position of the appellants is bottomed upon the erroneous assumption that before the adoption of Rule 19, they had a legal right to tack regular and irregular authorities and that it was not necessary to obtain express authorization from the Commission. In fact, their

argument is predicated on the assumption that the Commission is now prohibiting a right granted by their certificates of authority. Except in instances where the right to tack has been specifically granted by the Commission, the right does not exist. It is not an implied right inherent in existing certificates.

While the Commission had granted and prohibited the tacking of authorities in the past, until 1966 it had no clearly defined tacking practice policy. Its failure previous to January 1, 1968, to enunciate a rule and regulation on tacking cannot conceivably be construed to imply that the right to tack was inherent in the certificate heretofore issued unless specifically restricted. The question is not as assumed by appellants, whether the Commission had previously indicated that tacking was not permitted, but rather has the Commission ever held that tacking was permitted unless specifically prohibited. The answer must be in the negative. We hold the right does not exist unless specifically granted.

On May 31, 1966, Romans Motor Freight, Inc., filed a petition for the institution of a general investigation and for issuance of general orders with respect to tacking of authorities. A hearing was held, "In the Matter of a General Investigation of Tacking of Authorities," on September 12, 1966. At that hearing counsel for Romans suggested the problems involved and the need for an order to clarify the issues. Another public hearing was held on March 14, 1967. Pursuant to those hearings, the Commission on October 9, 1967, entered Rule and Regulation Order No. 8, to become effective on January 1, 1968. This rule provided that motor carriers should not tack their irregular route authorities and, unless specifically authorized by the Commission after notice and hearing, they should not tack their

irregular route and regular route authorities nor tack their regular route authorities. As used in the rule, "tacking" included the terms "joining" and "combining."

On December 7, 1967, the Commission entered Rule and Regulation Order No. 10 pursuant to a public hearing held on November 29, 1967, providing that the provisions of Rule and Regulation Order No. 8, pertaining to regular route authorities, should not apply to such authorities granted on or before December 31, 1967.

We set out pertinent legislative provisions so far as material herein. Section 75-109, R. R. S. 1943, provides: "The commission shall have the power to * * * exercise a general control over, all common carriers * * *."

Section 75-110, R. S. Supp., 1969, provides: "* * * The commission shall also promulgate regulations which the commission deems necessary to regulate persons within the commission's jurisdiction. The commission shall not take any action affecting persons subject to the commission's jurisdiction unless such action be taken pursuant to a rule, regulation, or statute."

Section 75-301, R. R. S. 1943, provides: "It is hereby declared to be the policy of the Legislature to (1) regulate transportation by motor carriers in intrastate commerce upon the public highways of Nebraska in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers, in the public interest; (2) promote adequate economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discrimination, undue preferences or advantages, and unfair or destructive competitive practices; (3) improve the relations between and coordinate transportation by, and regulation of,

motor carriers and other carriers; (4) develop and preserve a highway transportation system properly adapted to the needs of the commerce of Nebraska; (5) cooperate with the several states and the duly authorized officials thereof; and (6) cooperate with the Interstate Commerce Commission in the administration and enforcement of the Federal Motor Carrier Act, 1935, approved by the President on August 9, 1935. The Legislature declares that all of the available carriage service, including common carriage by rail and road, and contract carrige by road, are so interdependent that the public may not continue to have a safe, dependable transportation system unless contract carriers operating on the same roads with common carriers are brought under just and reasonable regulations bringing their service into relation with common carriers."

Section 75-309, R. S. Supp., 1969, provides: "It shall be unlawful for any common or contract carrier by motor vehicle subject to the provisions of articles 1 and 2 of this chapter and sections 75-301 to 75-322.01 to engage in any intrastate operations on any public highway in Nebraska unless there is in force with respect to such common carrier a certificate of public convenience and necessity, or a permit to such contract carrier, issued by the commission authorizing such operation."

Section 75-311, R. S. Supp., 1969, provides in part: "A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing that the applicant is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of sections 75-301 to 75-322.01 and the requirements rules, and regulations of the commission thereunder and that the proposed service, to the extent to be authorized by the certificate, whether

regular or irregular, passenger or property, is or will be required by the present or future convenience and necessity; otherwise said application shall be denied."

To put the problem in proper perspective, understanding of the differences in the authorities is necessary. For the purposes of this opinion, regular route authority covers the transportation of property in intrastate commerce by motor vehicles between fixed termini and over a specified highway or highways upon a fixed schedule. Irregular authority covers the transportation of property in intrastate commerce by motor vehicle over irregular routes at any time convenient to the carrier over any convenient highways from a base point to any place within a defined radial area, or from any place within the area to the base point, or in the case of irregular nonradial authority, between points in the area without reference to a fixed base point. Simply stated, the practice of tacking involved herein is the operation by a carrier between two or more of its irregular routes or between irregular and regular routes in order to reach a point which could not legally be served by operation over any single irregular or regular route or combination of regular routes.

Appellants have not produced any Nebraska citations to support their contention that a right to tack existed prior to the adoption of a general policy by the Commission. In fact, counsel for appellants stated at the hearing: "Now, there's never been a rule adopted by this Commission from the time the Motor Carrier Act was passed until the first rule was adopted effective January 1, 1969, that had anything at all to do with tacking or interlining. There were some representations made by Commission personnel, including myself when I worked for this esteemed body, that you couldn't tack regular and irregular authority, but there was never a regulation of any sort adopted on it until January 1, 1969."

Counsel was wrong as to the date. Rule and Regulation Order No. 8 to which he refers became effective on January 1, 1968.

To permit unlimited tacking when the certificates now in effect were not issued with reference to that right, violates the intent and purpose of the law relating to common carriers. To do so expands certificated authority in violation of the intent of the Commission in granting the original certificates of authority. It is the certificate which determines the terms or extent of the carrier's operations. If the right to tack is not specifically granted, it does not exist. Contrary to the contention of the appellants, we agree with the Commission that in order to best serve the public interests and to protect existing certificates of public convenience and necessity heretofore issued by the Commission, the tacking or joining of regular to irregular route authorities, as well as irregular to irregular route authorities, should no longer be allowed, and that proposed Rule 19 should be adopted.

The determination of this policy by the Commission is within its inherent jurisdiction. We respect its finding that it cannot effectively and efficiently regulate the motor carrier industry or best serve the public interest if it continues to allow such tacking of authorities. We accept its conclusion that the tacking prohibited herein tends to eliminate and destroy the limitations and restrictions placed upon such certificates of public convenience and necessity by the Commission's orders and rules and regulations. Henceforth, where there is a need for irregular service into an area or community outside the central radius of an irregular route radial authority, an application must be made to the Commission to serve such point or points as an additional base point to the carrier's irregular route authority. Likewise, if there is a need for service to an

area or community on a regular basis, such areas or communities can be served by making application to the Commission to serve these points as off-route points to the carrier's existing regular route. Such applications will be granted by the Commission upon a showing of the statutory requirements of the carrier's fitness and public convenience and necessity.

To illustrate, Seward Motor Freight, Inc., has regular route authority between Omaha and Grand Island via Lincoln and Seward, and irregular route authority between points and places within a 10-mile radius of Seward and between points and places within said radial area and points and places in Nebraska. Tacking of its regular and irregular route authorities would destroy the type of certificates under one or both of the authorities. For example, if Seward began to conduct operations regularly from Omaha to Seward, and then on its irregular route authority to the communities within that authority, it would be transforming its irregular route authority to a regular route authority to those towns. On the other hand, if it was not limited to the towns within the 10-mile radius but rather it hauled shipments from Omaha to Seward and then to various points in the State of Nebraska on an irregular basis, then it would be performing irregular route operations on the regular portion of its certificate from Omaha to Seward. In this way the granting of regular and irregular route tacking can destroy the classifications the Commission has made through its rules and regulations on one or both of the authorities. It is no answer to assert that the Commission has power to control abuses. The feasibility and propriety of this expansion of the certificates has never been considered by the Commission. It has had no opportunity to consider the public convenience and necessity of the expanded authority.

To find prescriptive rights to tack would expand the scope of the authorities tacked without giving the Commission the opportunity to determine the necessity for such expansion under section 75-311, R. S. Supp., 1969. Seward argues that denial of its right to tack will deprive some towns of the service it is able to perform. We appreciate that in the interest of effective and efficient regulation of motor carriers there will be some such problems. As the record discloses, the towns listed by Seward as being adversely affected are not totally without remedy.

Appellants contend that Rule 19 was entered without jurisdiction or power to enter it. Section 75-110, R. S. Supp., 1969, specifically requires the Commission to adopt rules and regulations which it deems necessary to regulate persons within its jurisdiction. Section 75-118.01, R. S. Supp., 1969, gives the Commission original, exclusive jurisdiction to determine the validity of a rule or regulation and the scope and meaning of a certificate.

There can be no question that Rule 19 is within the ambit of authority granted to the Commission by sections 75-109, R. R. S. 1943, and sections 75-110, 75-310, and 75-311, R. S. Supp., 1969. To hold otherwise would destroy the effectiveness of those sections. There may be instances where tacking could be permitted without undue interference with other certificates of authority, but these are policy questions within the jurisdiction of the Commission.

There is no merit to appellants' contention that the order deprives them of rights and property without due process of law. As suggested heretofore, the order is not a limitation, revocation, change, or modification of any authority previously granted, as contended by appellants in claiming the Commission is acting retro-

spectively so as to restrict or reduce valuable rights. Section 75-313, R. R. S. 1943, so far as material herein, requires that: "Each certificate shall specify the service to be rendered, the routes, the fixed termini, if any, and the intermediate and off-route points, if any, and in case of operations not over specified routes or between fixed termini, the territory within which such carrier is authorized to operate. Each permit shall specify the business of the contract carrier covered thereby and the scope thereof." Seward has no rights other than those specifically granted by its present certificates of authority.

Unless tacking was specifically authorized by the Commission, Seward had no right to tack its regular and irregular route authority. The fact that it may have performed unauthorized operations under the impression that it had such right does not create a property right or a right to tack. Common carriers cannot acquire prescriptive rights by virtue of unauthorized use of routes. Interstate Common Carrier Council of Maryland, Inc. v. United States, 84 F. Supp. 414, affirmed, 338 U.S. 843, 70 S. Ct. 91, 94 L. Ed. 516.

Appellants argue that most states permit tacking but cite no statutory or case authority for it in Nebraska. Our observation is that in those jurisdictions which permit it, the original certificates were probably issued in the light of that practice and the certificating agency had an opportunity, in the light of the practice, to attach conditions to the certificates where the public interest would not be served. In any event, tacking is an extension of the authorized service and must be and is under the regulation of the Commission rather than being left to the unbridled discretion of the carriers subject to regulation by the Commission.

Rule 19 was adopted by the Commission pursuant to an informal, nonadvisory type proceeding had by the Commission on its own initiative. Notice of the hearing was published and a copy of the notice was sent to those who could be affected. This proceeding was within the ambit of the Commission's jurisdiction and we find no fault with the procedure adopted. The order adopted is of a legislative nature, with general application to all carriers within a certain class. We have frequently said that on an appeal from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order is reasonable and not arbitrarily made. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

The Seward application was largely predicated on its claim that for several years it had tacked its regular and irregular route authorities at the common point of Seward. As heretofore suggested, this operation was conducted under the erroneous assumption by the appellant that it was permitted to do so. It did not have that right, and the evidence of such operation cannot be used to invoke a prescriptive right to tack. Consequently, the denial of the right is not unreasonable or arbitrary. The fact that tacking, herein prohibited, may have previously been permitted after hearing in some instances, does not change that situation. In view of our holding on the amended rule and regulation herein, the action on the Seward application is affirmed. The relief available to Seward is the filing of applications for the amendment of its authority, as suggested above.

JUDGMENTS AFFIRMED.

McCOWN, J., dissenting.

I respectfully dissent.

The majority opinion holds the "tacking" of unrestricted authorities is illegal and in violation of the intent of the Commission in granting the original certificates. It also states: "If the right to tack is not specifically granted, it does not exist." There is no authority for those statements and they are flatly contradicted by repeated holdings of the Interstate Commerce Commission and federal courts as applied to interstate carriers.

In Aetna Freight Lines, Inc., Interpretation of Certificate, 48 M.C.C. 610 (1948), the Interstate Commerce Commission said: "The right of the motor common carrier to tack separate grants of unrestricted authorities is well settled regardless of whether the authorities involve regular routes, irregular routes, or a combination of both." To the same effect, see M. I. O'Boyle & Son, Inc. v. E. Brooke Matlack, Inc., 81 M.C.C. 201 (1959). As to the type of situation involved here, see Malone Freight Lines, Inc. v. United States, 107 F. Supp. 946 (1952), affirmed, Per Curiam, 344 U. S. 925, 73 S. Ct. 497, 97 L. Ed. 1348 (1953).

It should be noted also the evidence discloses that from the very beginning of motor carrier regulation in Nebraska, tacking of regular and irregular route segments of authority, as well as tacking of two irregular route segments, was permitted except where specifically prohibited. Until 1966, the Commission had no rule or regulation prohibiting or limiting carriers' right to tack generally and there had never been any statutory prohibition against operations involving tacking of any kind. The record here does not show any specific findings of fact which will support the Commission's general pro-

hibitory order applied retroactively as it was. The findings constitute statements of opinion of the Commission, reflecting the policy decision involved without the requisite factual support for such retroactive effect.

In addition to the overall issues involved in the general order prohibiting tacking, the majority opinion here affirms the order of the Commission denying the application of Seward Motor Freight, Inc., for the right to tack its own specific certificates. The only evidence in the record demonstrated that its services involving tacking on its own routes is needed by many shippers and some entire communities who would otherwise have no service or very inadequate service. There is no evidence that any other existing carrier could serve the need as well as the applicant. No carriers opposed the application. The evidence was clear that the operations provided by the tacking of authorities by Seward Motor Freight, Inc., and covered by the application had been conducted over a long period of time under color of authority. The test in such circumstances was set down in Black Hills Stage Lines, Inc. v. Greyhound Corp., 174 Neb. 425, 118 N. W. 2d 498. The test is (1) whether the operation will serve some useful purpose responsive to a public demand or need; (2) whether the purpose can or will be served as well by existing carriers; and (3) whether it can be served by applicant without endangering or impairing the operations of existing carriers contrary to the public interest.

Even if it be conceded that the Commission had authority to determine a general tacking policy, at least prospectively, there are no specific findings of fact to support the general order prohibiting tacking conducted over a period of years under color of authority and with the full knowledge and tacit consent of the Commission. Neither is there evidence in the record to

support the specific denial of the application of Seward Motor Freight, Inc. The action of the Commission in both instances was arbitrary and unreasonable and should have been set aside.